

2010

"If You Are Reading This, You Are Engaged and Aware": Serving the Diversity of Interests in Blogs Written by Service Members

Peter Colwell

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Colwell, Peter (2010) "If You Are Reading This, You Are Engaged and Aware": Serving the Diversity of Interests in Blogs Written by Service Members," *William Mitchell Law Review*: Vol. 36: Iss. 5, Article 16.

Available at: <http://open.mitchellhamline.edu/wmlr/vol36/iss5/16>

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“IF YOU ARE READING THIS, YOU ARE ENGAGED AND AWARE”: SERVING THE DIVERSITY OF INTERESTS IN BLOGS WRITTEN BY SERVICE MEMBERS

Peter Colwell[†]

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[†] George Washington Law class of 2010. The author would like to thank the following people for their support of this article: The *William Mitchell Law Review* staff and editors and Professor Jerome Barron.

I. INTRODUCTION

Lieutenant Matthew Gallagher, under the pen name “Lt. G,” was the author of “Kaboom: A Soldier’s War Journal,” until a superior officer ordered Gallagher to take the blog down.¹ The blog, which was at times “hilarious, maddening, and terrifying,” provided “raw and insightful snapshots of a conflict [in which] many Americans have lost interest.”² Lt. G’s blog drew tens of thousands of page views and “had a following that would be the envy of many a small-town paper.”³ Lt. G’s blog was not a condemnation of the war in Iraq, but rather an insightful depiction of the conflict, filled with stories about Gallagher’s experiences as a service member in Iraq.⁴ Lt. G wrote about what he saw as a growing disconnect between America and its service members.⁵ The blog’s collapse came after a posting on May 28, 2008, which Gallagher “failed to have vetted by a supervisor” and thereby violated military blogging rules.⁶ Readers of the blog were angered by the decision to shut it down.⁷ One reader commented that “[a] free society would not shut down [Lt. G’s] blog,” while another drafted a template letter and urged others to contact their lawmakers to demand that Gallagher be allowed to blog again.⁸ In his last entry, titled “A Tactical Pause,” Lt. G wrote: “Thank you for caring. Agree or disagree with the war, if you’re reading this, you are engaged and aware. As long as that is still occurring in a free society, there is something worth . . . fighting for.”⁹

In combat zones in Iraq and Afghanistan, service members are creating “real-time dispatches—in their own words—often to an audience of thousands through postings to their blogs.”¹⁰ At least

1. Ernesto Londoño, *Silent Posting*, WASH. POST, July 24, 2008, at C1. A blog is “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” Merriam-Webster’s Online Dictionary, Blog, <http://www.merriam-webster.com/dictionary/blog> (last visited Feb. 11, 2010).

2. Londoño, *supra* note 1, at C1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Jonathan Finer, *The New Ernie Pyles: Sgtlizzie and 67cshdocs*, WASH. POST, Aug. 12, 2005, at A1.

200 soldiers on active duty keep blogs.¹¹ These service members, often referred to as “milbloggers,”¹² offer a unique perspective on and coverage of conflicts. Some blogs are written with a gritty, almost “in-your-face” style that is unlike any other coverage of the war.¹³ The service members’ websites range from multimedia presentations of digital photos and videos to text written in a form akin to a journal.¹⁴ Some service member bloggers say they blog to keep their friends and families “up to date or to counter what they consider the biases of the mainstream media.”¹⁵ Many of the entries are profoundly personal.¹⁶

Sergeant Elizabeth Le Bel was in a Humvee when a roadside bomb sent her into a concrete barrier and killed her driver.¹⁷ Le Bel, though injured, returned to her unit a few days after the bomb attack.¹⁸ She attended the memorial service for her driver, who was also a soldier, and shared her thoughts in a subsequent posting:

I am now deathly afraid of the nightmares I have already
seen bits and pieces of. I can see them in my mind when I

11. *Id.*

12. Brian Stelter, *In Blog, a Military Man Writes About His Own Death*, N.Y. TIMES, Jan. 7, 2008, at C5. Some popular blog sites are The Mudville Gazette, <http://www.mudvillegazette.com> (last visited Feb. 11, 2010) (postings of “Greyhawk”) and Blackfive, <http://www.blackfive.net> (last visited Feb. 11, 2010). There are blogs unlike the ones this Note addresses that are published by existing media outlets. See, e.g., Frontlines, <http://frontlines.blogs.nytimes.com> (last visited Feb. 11, 2010). In the blogs posted on Frontlines, four members of the U.S. military—all active bloggers—write about their daily lives. *Id.* One soldier noted that the “only editing I received [from the Times] was for overall length or clarity of particular phrases.” Posting of First Lt. Lee Kelley to Frontlines, <http://frontlines.blogs.nytimes.com/2006/05/10/coda/#more-49> (May 10, 2006, 22:00:00 EST).

13. Finer, *supra* note 10, at A1 (“Written in the casual, sometimes profane language of the barracks, the entries give readers an unfiltered perspective on combat largely unavailable elsewhere. But they are also drawing new scrutiny and regulation from commanders concerned they could compromise security.”).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* (“There were no reporters riding shotgun on the highway north of Baghdad when a roadside bomb sent Sgt. Elizabeth Le Bel’s Humvee lurching into a concrete barrier. The Army released a three-sentence statement about the incident in which her driver, a fellow soldier, was killed. Most news stories that day noted it briefly. But a vivid account of the attack appeared on the Internet within hours of the Dec. 4 crash. Unable to sleep after arriving at the hospital, Le Bel hobbled to a computer and typed 1,000 words of what she called ‘my little war story’ into her Web log, or blog, titled ‘Life in this Girl’s Army,’ at <http://www.sgtlizzie.blogspot.com/>.”).

18. *Id.*

close my eyes, I see the truck slamming into the wall and it scares me all over again. Why did I walk away from a wreck that killed a comrade and friend?¹⁹

The significance of these blogs is illustrated by the range of interests that they serve. For the service member authors, the blogs serve as a therapeutic outlet and an exercise of quasi-First Amendment expressive rights. For the public, the blogs contribute a unique perspective of a conflict and foreign policy, and thereby serve to inform public debate. The blogs also contribute to the journalist community as a journalistic product with a special frontline perspective. Countering these interests served by the blogs are the military and national interests in protecting operational and national security.

The current regulatory regime governing blogs written by members of the military comes from official policy memoranda, Army Regulation 530-1, Operations Security (OPSEC), and Uniform Code of Military Justice (UCMJ) articles.²⁰ This regime fails to provide clear guidance to service members on what is required of them as bloggers, exactly what material they may publish on their blogs, and what the process is for review of blogs.²¹ The result is a perception of arbitrary punishment and a potential threat of “chilling” blogging by service members.²² Further, the regulatory scheme is centered on security considerations and fails to balance or adequately consider the other interests in blogs written by service members in combat zones.

This Note proposes that congressional legislation is necessary to regulate blogs written by members of the armed forces in combat zones. This legislation should weigh the concerns for operational and national security as well as the interests of service member authors, the military, the public, and the literary and journalist community to which these blogs contribute. Congress should enact a statute that creates a committee of civilian journalists and military officials to conduct reviews of blogs and only allow blog removal by vote. The journalists would have insight into journalistic concerns and ethics as well as the journalistic value of a

19. *Id.* The entire post is available at New Lives: Memorial Services and then Cake Eating Contests, <http://sgtlizzie.blogspot.com/2004/12/memorial-services-and-then-cake-eating.html> (last visited Feb. 11, 2009).

20. See *infra* Part II.A.

21. See *infra* Part II.A.

22. See *infra* Part II.A.

particular blog, while the military representatives would be able to halt publication of blogs that present genuine security risks. The statute should establish concise guidelines, informed by First Amendment jurisprudence, for the review of the postings to curb the discretion of the committee, and it should require written reports on decisions to shut down a blog.

In Part II, this Note begins by identifying and explaining the current regulatory regime that covers blogs written by service members in combat zones. The policy discussion will be used to frame the problems to which this Note proposes a solution: namely, the lack of clarity and guidance for soldiers in current regulation of the blogs and the need for a more comprehensive solution that considers the variety of interests in these blogs. Part III of this Note includes a discussion of relevant First Amendment principles. Part IV details the unique contributions that these blogs offer and the variety of interests at stake, and illustrates why new regulation is necessary. This includes amplification of the contributions that these blogs make to public discourse, to the individual authors of the blogs, and to the military's mission. Part V discusses the military's interests in these blogs, highlighting the importance of protecting national security and operational integrity. Finally, Part VI proposes a solution in the form of legislation that will address the range of interests and attempt to bring more clarity to current regulation of military blogs.

II. CURRENT REGULATION OF BLOGS WRITTEN BY SERVICE MEMBERS

A. *A Three-Part Regulatory Regime*

This section outlines current regulations affecting blogs written by members of the armed forces. The current regulatory regime governing blogs written by members of the military comes from three sources: (1) official policy memoranda, (2) an OPSEC regulation, and (3) UCMJ articles.

First, top military officials have promulgated official policy memoranda that address blogs and their content. In April 2005, the top tactical commander in Iraq, Lieutenant General John R. Vines, issued the military's first policy memorandum addressing soldiers' websites, which required that all blogs kept by service members in Iraq be registered and reviewed periodically by unit

commanders.²³ Unit commanders are required to review registered websites on a quarterly basis to ensure compliance with the regulatory scheme.²⁴ Discretion to enforce the policy was vested with unit commanders.²⁵ In doing so, commanders must weigh the risks of the release of information against the benefits of publishing to the Internet.²⁶ The Vines memorandum also provided that the Army Web Risk Assessment Cell (AWRAC)—a “team of information assurance personnel that conduct ongoing operational security and threat assessments of publicly-available Army web sites to ensure compliance with DoD and Army policy and best practices”²⁷—can notify website owners of a violation, and thereafter the owners must close their website until corrections have been made.²⁸ The policy prohibits military bloggers from publishing classified information, revealing names of service members who have been killed or wounded before their families are notified, and providing accounts of incidents that are still under investigation.²⁹

Blogs written by service members are also regulated by Army OPSEC Regulation 530-1. OPSEC Regulation 530-1 provides policy on operational security that requires soldiers to check with a commanding officer “before posting information in a public forum.”³⁰ Chapter 2-1(c) of OPSEC applies directly to blogs written

23. Finer, *supra* note 10, at A1; see also Memorandum from Lt. Gen. John R. Vines, U.S., Commanding, to “A” (Apr. 6, 2005), available at <http://www.thedonovan.com/archives/historystuff/Web%20log%20policy.pdf> [hereinafter *Vines Memorandum*].

24. *Vines Memorandum*, *supra* note 23, at 3.

25. Finer, *supra* note 10, at A1.

26. *Vines Memorandum*, *supra* note 23, at 3.

27. *Id.* at 2.

28. *Id.* at 3. Although the AWRAC exists, “the ultimate task of compliance” is left “to the individual and his commander.” Michelle Rosengarten, Note, *All Quiet on the Middle Eastern Front? Proposed Legislation to Regulate MilBlogs and Effectuate the First Amendment in the Combat Zone*, 24 CARDOZO ARTS & ENT. L.J. 1295, 1314 (2007).

29. Finer, *supra* note 10, at A1. For other official military memoranda regarding blogs written by service members, see Memorandum from Gen. Peter J. Schoomaker, Chief of Staff of the Army, to Army Leaders (Aug. 2005), available at <http://www.fas.org/sgp/news/2005/08/usa0805.html> (follow up to *Vines Memorandum*); Memorandum from Gen. Richard A. Cody, Vice Chief of Staff of the Army, to Army Leaders (Feb. 2005), available at <http://www.fas.org/sgp/news/2005/08/usa0805.html>.

30. Nikki Schwab, *Military Bloggers Wary of New Policy*, WASH. POST, May 5, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050500881.html>; see also DEP’T OF THE ARMY, REGULATION 530-1, OPERATIONS SECURITY (OPSEC), para. 2-1(c) (Apr. 19, 2007) [hereinafter OPSEC 530-1], available at <http://www.fas.org/irp/doddir/army/ar530-1.pdf>.

by Army personnel.³¹ It prevents disclosure of certain types of information on the Internet, and requires that Army members "consult with their immediate supervisor and their OPSEC Officer for an OPSEC review prior to publishing or posting information in a public forum."³² Chapter 2-1(g)(1) notes that blogs are included in this category.³³ Major Ray Ceralde, the Army OPSEC program manager and author of the OPSEC revision in 2007, said that OPSEC is "not traditional security, such as information security like marking, handling and classifying information; it's not the physical security of actually protecting classified information though they're all related and part of OPSEC."³⁴ Rather, Major Ceralde said that "OPSEC is different from traditional security in that we want to eliminate, reduce, and conceal indicators, unclassified and open-source observations of friendly activity that can give away critical information."³⁵

OPSEC 530-1, as revised, caused some apprehension amongst existing milbloggers about how the regulation would impact their postings.³⁶ One milblogger worried that commanders could interpret the policy to require them to read every single blog post before it goes on the Internet and noted that "[t]his could swamp commanders to a point where they will no longer allow blogging."³⁷ Some service members' blogging in combat zones also expressed that they were "unsure of how to deal with the updated policy," while others feared it would have a "chilling effect."³⁸

Finally, several articles from the UCMJ³⁹ are applicable in regulating blogs written by service members. They are primarily relevant as provisions under which a service member blogger may

31. OPSEC 530-1, *supra* note 30, para. 2-1c.

32. *Id.* para. 2-1(g).

33. *Id.* para. 2-1(g)(1).

34. J.D. Leipold, *Army Releases New OPSEC Regulation*, ARMY.MIL, Apr. 19, 2007, <http://www.army.mil/-news/2007/04/19/2758-army-releases-new-opsec-regulation>.

35. *Id.* Major Ceralde explained that the "Internet, personal Web sites, blogs (Web logs)—those are examples of where our adversaries are looking for open-source information about us." *Id.* Further, "[o]pen-source information isn't classified and may look like nothing more than innocuous bits of information, a piece here, a piece there, like pieces of a puzzle. But when you put enough of the pieces together you begin to realize the bigger picture and that something could be going on." *Id.*

36. Schwab, *supra* note 30.

37. *Id.*

38. *Id.*

39. Uniform Code of Military Justice, 10 U.S.C. §§ 880–934 (2006).

be punished for publishing certain content on a blog, failing to abide by regulations impacting blogs, and generally using blogs in a way that negatively impacts the armed forces. Three provisions are of primary relevance for regulating blogs.⁴⁰ First, UCMJ Article 92 renders punishment for violating or failing to obey a regulation or order.⁴¹ Thus, this provision could be triggered if a milblogger fails to obey OPSEC 530-1, a policy memorandum, or an order from a superior officer regarding a blog. Second, Article 88 forbids a commissioned officer from using “contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, [or] Commonwealth.”⁴² This provision appears to regulate the content of blogs and the tenor of language used in blogs. Finally, Article 134 is a general provision allowing for punishment of “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital.”⁴³

The UCMJ includes several articles under which a milblogger could be subject to punishment and, although service members may bring constitutional objections to punishment given under the UCMJ, case law demonstrates that “a military member’s free speech challenges are rarely upheld.”⁴⁴ Thus, policy memoranda, OPSEC regulations, and UCMJ articles all combine to form the policy that regulates blogs written by service members in combat zones. The enforcement of the policy is primarily in the hands of unit commanders.⁴⁵

40. Tatum H. Lytle, Note, *A Soldier's Blog: Balancing Service Members' Personal Rights vs. National Security Interests*, 59 FED. COMM. L.J. 593, 602 (2007) (stating that Articles 134, 92, and 88 limit a soldier’s freedom of speech in the context of a blog).

41. 10 U.S.C. § 892, art. 92 (2006).

42. *Id.* § 888, art. 88.

43. *Id.* § 934, art. 134.

44. Lytle, *supra* note 40, at 602; *see also* United States v. Howe, 17 U.S.C.M.A. 165, 177–79, 37 C.M.R. 429, 441–43 (1967) (holding that Article 133 of the Uniform Code of Military Justice did not violate the First Amendment in a case where a Lieutenant took part in a public demonstration and carried a sign opposing the Vietnam War); United States v. Grow, 3 U.S.C.M.A. 77, 85–87, 11 C.M.R. 77, 85–87 (1953) (upholding a conviction under Article 92 of the Uniform Code of Military Justice for recording top secret information in a diary when portions of it were published in a Communist publication).

45. Finer, *supra* note 10, at A1.

B. *Examples of Punishment*

Lt. G, as noted above,⁴⁶ was ordered to take down his blog because he failed to have one posting approved by a supervisor.⁴⁷ One journalist noted that the fact that Lt. G's posting "depicted an officer in the unit unflatteringly" may have played a role in the order.⁴⁸ The circumstances surrounding the shutdown of Lt. G's blog are particularly illustrative of the shortcomings of current policy and the discretion vested in unit commanders. In a blog posting, Lt. G described his conversation with his supervisor in which Lt. G declined an offer for a promotion—a decision which also may have influenced the shutdown order.⁴⁹ Lt. G wrote that the supervisor took Lt. G's denial to the offer "like a spurned teenage blonde whose dreamboat crush tells her point-blank that he prefers brunettes."⁵⁰ Shortly after this posting, Lt. G was ordered to delete his blog, although the content remained available on the Internet in an archive blog run by his friend.⁵¹ A military spokesman said in an email that Lt. G's site, Kaboom, was "deemed by the commander to be counter to good order and discipline of his unit," and also that "the blog had not been registered with the military, an assertion Dennis Gallagher [Lt. G's father] disputes."⁵²

Arizona National Guard Specialist Leonard Clark was found to have violated the policy governing these blogs for posting what was, per the military, classified material.⁵³ Clark was fined \$1,640 and demoted to private first class, and his site has been shut down, although much of the substance of his blog is available in other locations on the Internet.⁵⁴ Other service member bloggers chose to take down their sites after receiving "warnings from superiors."⁵⁵

The mystery surrounding the shutdown of Lt. G's blog is in-

46. See *supra* notes 1–9 and accompanying text.

47. Londoño, *supra* note 1, at C1.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Finer, *supra* note 10, at A1; see also Katherine C. Den Bleyker, Note, *The First Amendment versus Operational Security: Where Should the Milblogging Balance Lie?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401, 411–13 (2007) (noting that Army National Guard Spec. Jason Hartley was demoted in rank and fined \$1,000 for posting information about his unit's flight route in Iraq).

54. Finer, *supra* note 10, at A1.

55. *Id.* (noting Maj. Michael Cohen's decision to take down his blog).

dicative of the current policy's inadequacies. Current policy and regulations do not give adequate guidance to service member bloggers and are effectuated in a way that seems arbitrary and in which selective punishment from commanding officers may be employed. A more uniform and consistent policy is necessary to protect the diversity of interests in military blogs in combat zones.

III. THE ROLE OF THE FIRST AMENDMENT

This Part addresses the role of the First Amendment in this issue and how it shapes this Note's analysis. It discusses the different principles that may apply, and how the substantial deference afforded to military interests over asserted First Amendment rights of service members suggests that a challenge in court to current regulations would fail. Thus, a different solution is necessary to protect the expressive rights of military bloggers.

A. *Case Law: First Amendment Rights in the Military*

Three "themes" typify the deferential approach of the Supreme Court in First Amendment cases in the context of the military.⁵⁶ They include the Court's (1) effort to denigrate competing First Amendment concerns, (2) invocation of justiciability concerns, and (3) emphasis on the "separate society" idea.⁵⁷ One author suggests that an issue to acknowledge at the outset is the extent to which First Amendment issues in the context of the military are even justiciable (at least in a practical sense).⁵⁸ Although First Amendment limits on the military may be justiciable in theory, the Court's 1986 opinion in *Goldman v. Weinberger*⁵⁹ casts doubt on whether military regulations are subject to serious judicial review.⁶⁰

In *Goldman*, a member of the Air Force, who was an Orthodox Jew and ordained rabbi, was ordered to stop wearing his yarmulke while on duty indoors, pursuant to an Air Force regulation that prohibited members from wearing headgear indoors.⁶¹ The Court upheld the Air Force regulation that prohibited Goldman from

56. C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 815 (1988).

57. *Id.*

58. *Id.* at 804-05.

59. 475 U.S. 503 (1986).

60. Dienes, *supra* note 56, at 804.

61. *Goldman*, 475 U.S. at 504-05.

wearing his yarmulke because it “reasonably and evenhandedly regulated military dress in the interest of the military’s perceived need for uniformity and discipline.”⁶² In the course of its opinion, the Court wrote: “[o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”⁶³ The Court went further to write that the “military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission, the military must foster instinctive obedience, unity, [and] commitment.”⁶⁴ Still, the Court noted that “[t]hese aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment.”⁶⁵

In 1987, Congress responded to *Goldman* with legislation, enacting 10 U.S.C. § 774.⁶⁶ This statute provides that “a member of the armed forces may wear an item of religious apparel while wearing the uniform,” unless “the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative.”⁶⁷ The sequence of events surrounding *Goldman* and the subsequent legislation provide an example of effectively using legislation to affect the rights of service members. This Note’s proposed legislation is intended to be similarly successful in addressing military blogs.

While *Goldman* dealt with expressive rights in the form of religious attire, *Brown v. Glines*⁶⁸ involved a First Amendment challenge to a regulation which required permission from commanders before Air Force members could circulate petitions on Air Force bases.⁶⁹ After an Air Force captain was removed from active duty because he circulated petitions without prior consent from the base commander, he challenged the regulation as violating the First Amendment.⁷⁰ The Supreme Court determined that the regulations were valid because they did not restrict speech more than was

62. *Id.* at 510.

63. *Id.* at 507.

64. *Id.*

65. *Id.*

66. 10 U.S.C. § 774 (2006).

67. *Id.* § 774(a)–(b).

68. 444 U.S. 348 (1980).

69. *Id.* at 349.

70. *Id.* at 351.

reasonably necessary to protect the substantial government interest in securing military effectiveness.⁷¹ In a noteworthy dissent, Justice Brennan argued that “the concept of military necessity is seductively broad, and has a dangerous plasticity.”⁷² *Brown v. Glines* shows how prior restraints on speech by members of the armed forces are valid if reasonably necessary to protect a substantial government interest. Brennan’s dissent provides a strong argument that “military necessity” as a single justification is too broad, and that restricting First Amendment rights of service members should require genuine and case-specific justifications.

Justice Douglas offered a similar criticism of the Supreme Court’s jurisprudence in cases involving First Amendment rights of service members in *Secretary of the Navy v. Avrech*.⁷³ In *Avrech*, the Court upheld UCMJ Article 134 after a soldier in a Vietnam combat zone, who wrote in opposition to the war and planned to copy and distribute his writing, brought a First Amendment vagueness challenge.⁷⁴ The soldier, Avrech, was convicted under UCMJ Article 80 for attempting to commit an offense under Article 134, or an “attempt to publish a statement disloyal to the United States to members of the Armed Forces with design to promote disloyalty and disaffection among troops.”⁷⁵ The Court of Appeals for the District of Columbia overturned Avrech’s conviction and asserted that “Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities.”⁷⁶ The Supreme Court reversed, noting that *Parker v. Levy*,⁷⁷ which upheld UCMJ

71. *Id.* at 356–57.

72. *Id.* at 369 (Brennan, J., dissenting).

73. 418 U.S. 676 (1974).

74. *Id.* at 676–77.

75. *Id.*

76. *Avrech v. Sec’y of the Navy*, 477 F.2d 1237, 1241 (D.C. Cir. 1973).

77. 417 U.S. 733, 760–61 (1974). In *Parker*, a foundational case for First Amendment jurisprudence in the context of the military, the Supreme Court wrote that “[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.” *Id.* at 758. The Court held that an Army officer’s conduct in:

publicly urging enlisted personnel to refuse to obey orders which might send them into combat was unprotected under the most expansive notions of the First Amendment. Articles 133 and 134 may constitutionally prohibit that conduct and a sufficiently large number of similar or related types of conduct so as to preclude their invalidation for overbreadth.

Articles 133 and 134 over vagueness and overbreadth⁷⁸ objections, would require reversal of the Court of Appeals decision on the merits of the constitutional challenge to Article 134.⁷⁹ In dissent, Justice Douglas denounced the Court's separate First Amendment treatment of the military:

Secrecy and suppression of views which the Court today sanctions increases rather than repels the dangers of the world in which we live. I think full dedication to the spirit of the First Amendment is the real solvent of the dangers and tensions of the day. That philosophy may be hostile to many military minds. But it is time the Nation made clear that the military is not a system apart but lives under a Constitution that allows discussion of the great issues of the day, not merely the trivial ones—subject to limitations as to time, place, or occasion but never as to control.⁸⁰

Despite the vigilant dissents of some Justices concerning First Amendment rights of service members, the First Amendment does not appear to have the same application in the military context as in the civilian setting.⁸¹ The Court justifies this First Amendment jurisprudence that is deferential to the military by noting differences between the civilian and military contexts: "[I]n the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel 'without counterpart in civilian life.'"⁸²

Further, the Court has noted that "the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view."⁸³ This suggests that a statute issued by Congress may be the most prudent solution to providing service members with expressive, First Amendment-like rights.

Id. at 761.

78. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (discussing the overbreadth doctrine).

79. *Avrech*, 418 U.S. at 678.

80. *Id.* at 680 (Douglas, J., dissenting).

81. See *Priest v. Sec'y of the Navy*, 570 F.2d 1013, 1017–18 (D.C. Cir. 1977); see also *Parker*, 417 U.S. at 758–59 (quoting *United States v. Priest*, 21 C.M.A. 564, 570 (1972)).

82. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

83. *Id.* at 301.

B. *Implications of a Different Medium*

As blogs are published on the Internet, a slightly different First Amendment analysis may be applicable. Several Supreme Court cases suggest that different media require a different First Amendment analysis. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,⁸⁴ the Supreme Court considered a First Amendment challenge to provisions regulating cable television broadcasting.⁸⁵ In that case, Justice Breyer used a balancing approach in his plurality opinion that weighed the interests of the Government in regulating the expression against the interests in access for expression in cable television.⁸⁶ Professor Jerome Barron wrote an enlightening article about Justice Breyer's unique "balancing" approach to electronic media.⁸⁷ According to Professor Barron, Breyer's "new balancing casts a wider net and recognizes that, in the contemporary electronic media context, many speech interests seek access."⁸⁸ Further, Barron notes that the balancing analysis "does not give primacy to one interest over another, but instead seeks to account for the multiplicity of interests and to weigh the relative strength of the competing access interests."⁸⁹ His conception of Breyer's balancing analysis is relevant to the statutory proposal in this Note because it recognizes an approach to situations where there is a multiplicity of interests in expression that "highlights the entire gamut of interests in play."⁹⁰ This balancing approach is valuable in shaping regulation of military blogs to provide for the diversity of interests involved.

A medium-specific approach may be applied to blogs written by service members in combat zones because the blogs are a distinct product of the Internet. In *Reno v. ACLU*,⁹¹ Justice Stevens, writing for the Court, described the unique nature of the Internet:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but

84. 518 U.S. 727 (1996).

85. *Id.* at 732.

86. *Id.* at 740-43.

87. Jerome Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 817 (1998).

88. *Id.*

89. *Id.*

90. *Id.*

91. 521 U.S. 844 (1997) (holding that portions of the Communications Decency Act violated the freedom of speech provisions of the First Amendment).

also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soap-box.⁹²

In other contexts, the Court has considered the “accepted usage” of a particular medium to determine whether restriction is appropriate.⁹³

Although this Note does not argue that an entirely new “cyber-law”⁹⁴ is necessary for adequate regulation of military blogs, it is vital to highlight features of the unique medium through which these blogs are published to emphasize the importance of a tailored regulatory regime. The Supreme Court’s attention to the media at play in First Amendment jurisprudence suggests that it is appropriate to consider the special nature of a blog in constructing a policy for regulation, and Breyer’s balancing approach from

92. *Id.* at 870.

93. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543 (2001) (“[T]he government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning. Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program’s purposes and limitations.”).

94. Some have argued that precedent is inadequate to govern blogs written by service members in combat zones, and that new, medium-specific cyberlaw that accounts for the unique issues raised in cyberspace should be used. *See* Julia E. Mitchell, Note, *Warring Ideologies for Regulating Military Blogs: A Cyberlaw Approach for Balancing Free Speech and Security in Cyberspace*, 9 VAND. J. ENT. & TECH. L. 201 (2006). This Note will not attempt to resolve the debate surrounding whether blogs should be treated as an analog to print media, or whether they should be treated with an entirely specific regulatory regime. *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1202 (1998) (suggesting a model for grounding cyberspace transactions in real-space law); David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365, 1366 (2002) (arguing that “the jurisdictional and choice-of-law dilemmas posed by cyberspace activity cannot be adequately resolved by applying the ‘settled principles’ and ‘traditional legal tools’ developed for analogous problems in realspace”). This Note does, however, assume that existing jurisprudence can be adapted so as to inform policy governing blogs written by members of the armed forces in combat zones. Therefore, this Note adopts an “unexceptionalist” approach at least in that regard. *See* Mitchell, *supra*, at 212–13. There are other approaches that could be used to balance the First Amendment interests with concerns for national security. *See* Holly S. Hawkins, Note, *A Sliding Scale Approach for Evaluating the Terrorist Threat Over the Internet*, 73 GEO. WASH. L. REV. 633, 634 (2005) (arguing that the “appropriate balance between the First Amendment and national security interests is best accomplished by adopting the *Zippo* court’s website categorization and applying a different level of regulation to each of the three categories”).

Denver Area may provide a foundation for addressing the variety of interests in blogs written by service members in combat zones.

IV. VALUE WORTH PROTECTING: A RIGHT OF ACCESS AND EXPRESSION

Blogs written by service members in combat zones serve a range of interests and contribute as a source of journalism in a variety of ways. For the service member authors, the blogs are an exercise of First Amendment-like expressive rights—rights that are not entirely lost upon enlistment. The blogs are also therapeutic outlets for soldiers to reflect and cope with the tension that is inherent in war. For public readers, the blogs offer a special insight on a war and policy which are in constant debate. Finally, the blogs have value simply as a journalistic product with a frontline perspective.

Although service members do not have the same First Amendment rights held by civilians in the United States,⁹⁵ members of the armed forces should not lose all rights of expression when they are in combat zones. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”⁹⁶ As noted above, in the dissents of Justice Brennan in *Brown v. Glines* and Justice Douglas in *Avrech*, “military necessity” alone as a justification for suppressing expression by service members may be too broad to validate the repression of all expressive activity by service members.⁹⁷ Thus, in absence of a specific justification, there is authority in separate opinions of Supreme Court Justices for the proposition that service members retain at least some expressive rights.

Moreover, as Professor C. Thomas Dienes argues, “[F]irst [A]mendment autonomy concerns are important to the military society.”⁹⁸ This is so because “the ability to make choices and the need for educated, well-developed persons is regarded by the military itself as critical in the modern army,” and “the capacity for effective decision-making is said to be a necessary ingredient for

95. See *supra* Part III.

96. U.S. CONST. amend. I.

97. See *supra* notes 68–80 and accompanying text.

98. Dienes, *supra* note 56, at 816.

being a good officer.”⁹⁹ Professor Dienes argues further that “[s]tagnation born of excessive conformity would seem as especially serious concern in the military bureaucracy” and thus, “it is difficult to believe that the interests of the military society are served by inhibiting the development of those skills and capacities required for full participation in any society.”¹⁰⁰ Consequently, it may be in the interest of the military to allow service members to develop thoughts and express them by way of blogging.

Further, the blogs provide service members with an outlet to express their thoughts on the conflict, discuss very personal experiences in war, and relieve the tensions of war.¹⁰¹ The therapeutic value of blogs for service members in providing a tool for personal reflection supplements the value of the information itself.¹⁰²

A significant part of the value of blogs written by service members lies in the unique perspective and information they offer to citizens. The blogs contribute to informed public discourse on the important policy issue of war, and thus the right of public access to these blogs is vital.¹⁰³ Professor Jerome Barron argued for “a right of access” to the press in a 1967 article published in the *Harvard Law Review*.¹⁰⁴ The press is not only a check on the Government, but also an invaluable source of information, viewpoints, and data to serve the public in discourse on policy.¹⁰⁵ Blogs written by service members are of increasing importance as coverage of the war in Iraq declines, newspapers face financial difficulties, and fewer embedded journalists are placed in Iraq among service members.¹⁰⁶ Blogs give the public and service members access to an alternative press-like media. One commentator urged that the

99. *Id.*

100. *Id.* at 816–17.

101. *See* Den Bleyker, *supra* note 53, at 426.

102. *Id.*

103. *See id.* at 427–28.

104. *See generally* Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (discussing ideas behind free expression, the marketplace of ideas, and their relationship to mass media).

105. *See id.* at 1648–50.

106. *See* Ernesto Londoño & Amit R. Paley, *Western Journalists in Iraq Stage Pullback of Their Own*, WASH. POST, Oct. 11, 2008, at A1 (“The number of foreign journalists in Baghdad is declining sharply, a media withdrawal that reflects Iraq’s growing stability and the financial strains faced by some news organizations.”). The number of embedded journalists decreased from 219 in September 2007 to 39 in September 2008. *Id.*

frontline personal accounts in these blogs may be the only consistent “sources of information that can supplement the fragmentary reports” of traditional news media and adequately provide Americans with the information necessary “to make informed political decisions” and effectively participate in the democratic process.¹⁰⁷ Further, the “American electorate, to whom the First Amendment guarantees a free press, also derives a distinct benefit: Voters must be able to access the critical information that only these soldiers can provide.”¹⁰⁸

The Supreme Court in *Cox Broadcasting Corp. v. Cohn*¹⁰⁹ noted that “in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”¹¹⁰ If, as a result of the decline in coverage of the war in Iraq by traditional media outlets, members of the public are substituting blogs written by service members in place of traditional news coverage, then it becomes even more apparent that fair and clear regulation is necessary so that bloggers can continue to provide coverage of the conflict for the public. Additionally, the narrowing concentration of ownership of the media may lead to less diversity of expression,¹¹¹ in which case privately-operated media-like blogs and their unique content may be vital to ensuring the existence of diversity of expression.

Some blogs written by service members in combat zones may have intrinsic value as a product of journalism. The relationship between blogs and the press suggests the importance of the blogs as a source of “journalism.” Some assert that there are key similarities between bloggers and traditional journalists, and argue that journalists should not be defined by the “institution by whom they are employed or the medium through which they communicate, but by the function that they serve.”¹¹² In this way, service members who blog are quasi-journalists who may be entitled to First

107. Rosengarten, *supra* note 28, at 1298.

108. *Id.* at 1299.

109. 420 U.S. 469 (1975).

110. *Id.* at 491.

111. JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS § 8.03, at 1286 (7th ed. 2006).

112. Joseph S. Alonzo, Note, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 751, 753 (2006) (discussing the First Amendment privileges given to Internet journalists).

Amendment rights more akin to the press than the general, limited First Amendment rights of members of the armed forces. Others declare that bloggers who use a "journalistic" process deserve press-like protections.¹¹³ Under this approach, certain members of the armed forces who blog using a newsgathering process and editing procedures could be "journalists" and deserve these press-like protections.¹¹⁴ One Second Circuit case adopted a process-based approach to define who is a "journalist" in the context of deciding whether a journalistic privilege was applicable in the case.¹¹⁵

At least one military blogger has already been recognized for his contribution to the literary and journalist community.¹¹⁶ Colby Buzzell was awarded £5,000 and the Lulu Blooker prize for his book, *My War: Killing Time in Iraq*, which was voted best book of the year based on a blog.¹¹⁷ The book is a memoir drawn from a blog he kept while he was a machine gunner in Iraq.¹¹⁸ After blogging for six weeks, an order—without an explanation—required Buzzell to take down his blog; but by then he already had ten publishers

113. See Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 395–96 (2006).

114. See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1375 (2003) (discussing three approaches to defining "journalist").

115. *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). In that case, the Second Circuit discussed the nature of a "journalist":

We discern certain principles which we must use in determining whether, in the first instance, one is a member of the class entitled to claim the privilege. First, the process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public. Second, whether a person is a journalist, and thus protected by the privilege, must be determined by the person's intent at the inception of the information-gathering process. Third, an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press. Fourth, the relationship between the journalist and his source may be confidential or nonconfidential for purposes of the privilege. Fifth, unpublished resource material likewise may be protected.

Id.

116. Ed Pilkington, *Iraq Veteran Wins Blog Prize as US Military Cuts Web Access: Literary Award for Former Soldier's Online Dispatches: Critics Brand Pentagon's New Rules 'Self-defeating'*, THE GUARDIAN (London), May 15, 2007, at 3.

117. *Id.*

118. *Id.*

interested in his work.¹¹⁹ Buzzell's book has been translated into seven languages, and he has embarked on a freelance writing career and has written for *Esquire* magazine, among other publications.¹²⁰

The blogs' diverse value informs this Note's proposed regulatory regime and sheds light on the importance of this issue. Because blogs written by members of the U.S. armed forces in combat zones serve such a broad range of interests—their authors, the public, and the journalism and literary community—and cover such pressing conflicts as those in Iraq and Afghanistan, it is necessary and appropriate to give serious consideration to legislation that protects the variety of interests in these blogs.

V. MILITARY INTERESTS: HOW NOT TO UNDERMINE THE FIGHT FOR FREEDOM WHILE ALLOWING FREEDOM TO EXIST

Although the blogs serve many interests, they also have the potential to pose serious security risks to the war effort in combat zones. Thus, the military has a strong interest in monitoring the content of blogs written by service members. Officials from the armed forces, however, have expressed conflicting messages that leave blogging service members without a clear understanding of official policy regarding their blogs.

A. *National Security and Operational Integrity Concerns*

Blogs written by service members in combat zones implicate clear national security and operational integrity concerns. There is a conflict “between the military’s need to protect the military’s operational tactics and strategies versus the public’s right of access to the status of military operations.”¹²¹ Publication of certain material can pose obvious national security threats if obtained by those disposed to harm service members and the American mission in combat zones—courts have recognized this even when civilians publish information. For example, in *United States v. Progressive*,

119. *Id.*

120. *Id.* (noting that “[t]he paradox of Buzzell’s victory is that it quickly follows the revelation that the Pentagon has introduced new rules restricting blogs among soldiers, fuelling speculation that live and unadorned combat writing from the field such as Buzzell’s may be the last of its kind,” and that Buzzell called the new policy “totally screwed up”).

121. Lytle, *supra* note 40, at 595.

Inc.,¹²² a federal district court enjoined publication of an article about hydrogen bombs because it was "analagous [sic] to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint."¹²³ Conversely, in *New York Times Co. v. United States*,¹²⁴ the Supreme Court ruled in favor of publication of the Pentagon Papers because the Government had not met the heavy burden of showing a national security concern that would justify enjoining publication.¹²⁵

When the nation is at war, the Supreme Court has been particularly wary of the publication of material that may pose national security risks. In *Schenck v. United States*,¹²⁶ the Court noted that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."¹²⁷ When the Army released the new OPSEC regulation, one official noted the risks that unregulated blogs pose.¹²⁸ The most obvious danger is revealing to enemies the locations and strategies of U.S. armed forces at war.¹²⁹ The blogs may also impact the order and discipline necessary in the military. This might be the case when the content of the blogs criticizes commanders and military policy. The interest in maintaining order may not be as compelling as maintaining operational integrity and protecting national security, but it is a justification for regulating the content of these blogs. Supreme Court precedent in cases such as *Goldman* show that discipline, order, and uniformity can serve as a compelling interest for the military when weighed against asserted rights of service members.¹³⁰

B. Blogs and the War Effort: Support for Blogs from the Top Creates a Mixed Message

High-ranking officials in the military, particularly the Army, have expressed support for blogging by members of the armed

122. 467 F. Supp. 990 (W.D. Wis. 1979).

123. *Id.* at 996.

124. 403 U.S. 713 (1971).

125. *Id.* at 714.

126. 249 U.S. 47 (1919).

127. *Id.* at 52.

128. Leipold, *supra* note 34.

129. *See id.*

130. *See supra* notes 61–65 and accompanying text.

forces, and have recognized the special qualities that blogs offer to readers. This support suggests that legislation proposed by this Note may be able to garner support within the armed forces, but also shows that military blogs might even contribute to the war effort.

Secretary of the Army Pete Geren and Chief of Public Affairs Major General Kevin Bergner attended a blogger's roundtable at the 2008 MilBlog Conference in Las Vegas, Nevada.¹³¹ Geren discussed the "rise of bloggers" as a way for young people to find their news online and how he has looked for "ways to increase the Army's knowledge of blogs."¹³² He noted that the Army's awareness of blogs "is critical as it looks to reach out to 17–25 year-olds," whom he called "the heart and soul of our Army."¹³³ Geren said the Army must "embrace every form of media."¹³⁴ Bergner noted the special texture, perspective, and personal element in these blogs and how they are meaningful to the public and to soldiers in the Army.¹³⁵

Major General William B. Caldwell IV, commander of the Combined Arms Center at Fort Leavenworth, Kansas, in a posting in the blog of the Small Wars Journal (<http://smallwarsjournal.com>), "decried the military's tendency to be 'risk averse' in the cyber world."¹³⁶ Caldwell wrote that "we must encourage our soldiers to interact with the media, to get onto blogs and to send their YouTube videos to their friends and family."¹³⁷

Former President Bush also recognized the contributions made by America's military bloggers.¹³⁸ "America's military bloggers are also an important voice for the cause of freedom," President Bush said in a remote broadcast to a group gathered in

131. Lindy Kyzer, *Secretary of Army encourages MilBloggers*, ARMY.MIL, Sept. 30, 2008, <http://www.army.mil/-news/2008/09/30/12867-secretary-of-army-encourages-milbloggers/>.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* ("We really do have some cultural challenges, and it really is all about getting some new ideas into the Army, but also getting some of the old ideas out of the Army," said Bergner. "And that's going to be a bit of a generational challenge.").

136. Seamus O'Connor, *Many Web Pages Off-limits to Airmen; Blogs, Video Sites Among Restricted URLs*, AIR FORCE TIMES, Feb. 18, 2008, at 12.

137. *Id.*

138. Schwab, *supra* note 30.

Northern Virginia for the 2007 MilBlog Conference.¹³⁹ President Bush continued: "You understand that defeating the terrorists requires us to defeat their ideology of hatred and of death with a more powerful vision, a vision of human liberty."¹⁴⁰ Taking President Bush's ideas slightly further, even the exercise of First Amendment rights by soldiers in Iraq and other combat zones, regardless of the content, represents the liberty that the War on Terror is supposed to spread to nations like Iraq and Afghanistan. In this way, the blogs support the foundation of the missions there.

The implications of blogs written by service members for national security and operational integrity are great. Acknowledging and addressing security concerns are vital to any successful policy governing blogs written by service members in combat zones. While the military has national security and operational integrity concerns with blogs written by service members in combat zones, the blogs also provide benefits to the war effort and the military, which should be acknowledged as well.

VI. A NEW REGULATORY SCHEME TO ADDRESS THE MANY INTERESTS IN BLOGS WRITTEN BY SERVICE MEMBERS IN COMBAT ZONES

How can law serve the variety of interests in military blogs and adequately consider both the contributions of the blogs and the risks that such blogs pose? Although it may be justifiable for the Supreme Court to make the First Amendment rights of service members more parallel to those held by civilians in the United States, current precedent establishes firm deference to the interests of the military in cases in which service members assert First Amendment rights. A quicker and more precise measure to resolve the ambiguous state of regulation governing military blogs is in the form of legislation enacted by Congress. On the debate floor, the interests of the public, the military, and service member authors could all be discussed to shape a new statute. This Note proposes that a statute should establish regulation with an oversight committee to review the content of these blogs. The committee should consider the variety of interests at play and adhere to explicit guidelines when deciding to block publication of a blog.

139. *Id.*

140. *Id.*

A. *New Legislation to Provide Clearer Guidance*

Under Article I of the U.S. Constitution, Congress has the authority to pass legislation affecting blogs written by service members on active duty in combat zones.¹⁴¹ New regulation of military blogs must provide clear guidance to bloggers about what can be published and about the process of registration. A clearly-worded regulatory statement is vital to meeting all of the competing interests in blogs written by service members. The focus of this legislation is on the oversight process, but the legislation should also include a provision intended to give more guidance to bloggers on appropriate content. Therefore, this proposed legislation will provide that military bloggers are to be given advanced notice in the form of a memorandum with material that they cannot under any circumstances publish on blogs. This includes the following:

- Classified information.
- Specific troop location.
- Specific strategic plans of particular military units.
- Casualty information before it is officially disclosed by the military.
- Photographs that include indicia of the precise location where the photos were taken in a combat zone.
- Denigrating remarks about fellow service members of any rank.

Bloggers will be given explicit permission to write about the following:

- Personal reflections on the war.
- Political opinions, as long as it is indicated that such views do not represent those of the armed forces and the material does not violate UCMJ Article 88.¹⁴²

141. See U.S. CONST. art. I, § 8 (providing that Congress has the power to raise and maintain a military). This proposed legislation applies only to blogs written by service members in combat zones. These are blogs written by service members earning “imminent danger pay” as defined in DoD Instruction No. 1340.9.

142. See 10 U.S.C. § 888, art. 88 (2006) (forbidding a commissioned officer from using “contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory,

- Recollection of events.
- General personal thoughts.
- Reflection on current events.

B. Creation of a Committee for Periodic Review

The legislation will provide for appointment of a committee of representatives from the military as well as journalist consultants, called the Committee on Service Member Expression (Committee), to perform both registration tasks related to blogs and monthly reviews of the blogs thereafter. The legislation will vest the appointment of Committee members in the President, as provided for in the Appointments Clause of the Constitution.¹⁴³ This legislation will take the task of administrative review of these blogs away from the commanding officers of individual bloggers, with hopes of increasing uniformity in review of the blogs and providing bloggers with more predictability in regulation. In the Committee, there will be six representatives of the armed forces and six representatives from the journalist community. The journalists will have experience-based insight into journalistic concerns and ethics as well as the value of a blog as journalism, while the military representatives will be able to anticipate whether publication of a blog poses genuine security risks.

Bloggers must register their blogs with the Committee prior to publication and bloggers must be made aware upon registration that the Committee will conduct monthly reviews of their blogs. Service members must be given the criteria that govern that review. When bloggers initially register with the Committee, they will give the Uniform Resource Locators (or URLs) at which their blog is located and their names. The Committee will provide each blogger with a copy of the legislation regulating the blogs. In the monthly review process, the Committee will initially determine if the blog

[or] Commonwealth”).

143. U.S. CONST. art. II, § 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

content complies with this statute. If the blog content is clearly prohibited by the language in this statute, the blog will be immediately shut down, and the blogger will be subject to appropriate sanctions provided by relevant UCMJ articles.

C. "Close Calls"

The primary purpose of forming this Committee is to make determinations on "close call" publications while weighing all of the varying interests in these blogs. These "close calls" are those publications that do not contain content that falls within any of the explicit prohibitions, but which may still potentially present national security or operational integrity concerns to the military. In such circumstances, the legislation creates a three-step process. Each member of the Committee will first independently review the content of the blog. This will be followed by a vote on whether the blog poses significant concerns related to security and order. If five or more members of the Committee vote that it does, the entire Committee will convene to review the blog, and the review must be completed within three weeks.¹⁴⁴

Each Committee member's review of the blogs is to be guided by experience in her relevant professional field (either journalism or the military) and a defined set of considerations adopted by Congress after debate on proposed guidelines. Allowing debate to form these considerations will provide for a more appropriate and exhaustive set of guidelines than would attempting to lay out a rigid set of guidelines in this Note. Congress can incorporate views derived from the personal experience of senior journalists and military officials in combat zones and from lively debate on the congressional floor.¹⁴⁵ This Note sets out the general interests involved in regulating military blogs so as to begin the debate on the most appropriate set of guidelines in reviewing each blog's content.

The guidelines call for Committee members to consider the

144. Each Committee member will be entitled to hire a staff of up to five individuals to aid with research and review of blogs written by service members.

145. Congress may consider using journalists' ethics in forming guidelines for the review of these blogs. See, e.g., Society of Professional Journalists, *Code of Ethics*, Sept. 1996, available at <http://www.spj.org/pdf/ethicscode.pdf> (last visited Feb. 19, 2010); The New York Times Company, *The New York Times Company Policy on Ethics in Journalism*, Oct. 2005, available at <http://www.nytc.com/press/ethics.html>.

value of the content of each blog to the service member author personally, the interests of the public as readers and as an electorate, the value of the content to literary and journalist communities as a product of journalism or literature, and the risks posed by the content to national security and operational integrity. Any system of ranking the importance of each interest would fail to demonstrate concern for the particular circumstances of each case, and thus no rigid weighting system is appropriate.

The guidelines should be shaped by First Amendment doctrine, considering foundational First Amendment rights of expression in this new medium of a blog, as well as the necessary limitations on First Amendment rights of service members in combat zones. In reviewing these blogs, the Committee should afford significant weight to the value of blogs that have content that includes political speech, or speech concerning matters of public concern¹⁴⁶ (e.g., military conflicts). The foreseeable risks to security must be more than speculative to justify shutting down a blog.

When the Committee convenes, the members will discuss the content of the blog. The members will state the content's value and assert the risks associated with the content. A vote will follow this debate on whether to permit or block the blog, with a tie resulting in shutting down the blog. Should the Committee require a blog to shut down, the members voting to shut it down must write a report of the decision that details the reasons why the blog was shut down. It must state which content required the blog to be shut down, but does not have to disclose classified information which is not known by the service member author that may have weighed in the decision. This report must be given to the blogger. The service member authors may not appeal the decision to shut down the blog, but may petition the Committee to re-register a new blog after a three-month period. If the Committee decides by a majority vote that the service member is unlikely to

146. *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("[T]wo inquiries . . . guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.") (citations omitted).

again post blog content that will pose security risks, the Committee has discretion to allow the service member to create a new blog on a probationary basis.

Finally, the legislation should include a provision for a review after one year of its implementation to determine if modifications are necessary to make the legislation more effective, clear, or practical.¹⁴⁷ There should also be a provision for a vote to extend the legislation's current form for a longer period or for a vote on a modified version of the statute. This will allow for review of the efficacy of the current version of this statute and of whether this regulatory scheme should be maintained.

VII. CONCLUSION

Blogs written by service members in combat zones like Iraq and Afghanistan provide a special perspective on military conflicts. They offer valuable contributions to public discourse on the war, which leads to a more informed electorate. Authors of the blogs exercise their First Amendment rights of free expression in a way that also serves as therapeutic personal reflections on difficult experiences in war. Former President Bush and senior military officials show support for these blogs as a means of winning the "war of ideology"—a war that can undermine the actual conflict. Yet, these blogs are not given the adequate protection or attention that they deserve by current military regulations.

New legislation should establish a committee of members from the military and the journalist community which reviews these blogs and ensures that only blogs that are true threats to security are removed and prevented from publication. The Committee should follow precise guidelines informed by First Amendment jurisprudence and provide service members with clear information up front about what they cannot publish on blogs. Blogs written by service members at war are symbolic of the freedom that their authors fight to protect. It is time for the military and Congress to adequately protect the freedom of service members who blog as well.

147. The review of this legislation will be performed by Congress. The members of the Committee will testify before Congress to aid in this review.